75-1345

IN THE

Supreme Court of the United States

October Term, 1975, No.

In the Matter of the Application of

KENT NURSING HOME,

Petitioner,

for an Order to Quash a Subpoena issued by the Office of the Special State Prosecutor for Health and Social Services (Charles J. Hynes),

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI

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OPINIONS BELOW

The decision of the Supreme Court, Special Term, Westchester County, is unreported, and appears in the Appendix, infra, p. 35. The opinion of the

Appellate Division, Second Judicial Department, is reported at 49 A.D. 2d 616, and is set forth in the Appendix, infra, p. 33. The opinion of the Court of Appeals of the State of New York is reported at 38 N.Y. 2d 260 and is set forth in the Appendix, infra, p. 23.

JURISDICTION

The order and decision of the New York Court of Appeals is dated December 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the records of a two-person family partnership are protected by the Fifth Amendment privilege against self incrimination.

2. Whether the non-judicial subpoena served was so extensive and overly broad so as to constitute a violation of petitioners' constitutional rights.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

The appellant, Kent Nursing Home, is a family partnership consisting of Annette Severino and Lawrence Severino, mother and son; Manlio Severino, husband and father, has managed the nursing home for the partners. The nursing home is conducted at Kent, Putnam County, New York.

The Kent Nursing Home is licensed by the State Department of Health. Records required under Public Health Law §2803-b and 10 NYCRR §730.6, have been kept, filed, were passed upon and audited by the State Department of Health and the State Department of Social Services.

During the year 1974, a great deal of newspaper, television and

radio publicity was devoted to the nursing home industry involving a United States Congressional Committee inquiry, a New York State Select Committee (Stein), the creation of a Moreland Commission by the Governor, and appointment of a Special Prosecutor (acting as a Deputy Attorney General through the office of the Attorney General of the State of New York).

On February 4, 1975, the Governor issued his executive Order #4, viz:

"TO: The Honorable Louis J. Lefkowitz
Attorney General of the State of New York
State Capitol
Albany, New York

WHEREAS, On January 10, 1975, Charles J. Hynes was appointed by you as Deputy Attorney General to act as Special Prosecutor to inquire into possible criminal violations in the nursing home industry and related matters; and

WHEREAS, On February 4, 1975, you requested, on behalf of Deputy Attorney General Charles J. Hynes, authorization to exercise the powers provided for by Executive Law

section 63, subdivision 8, in order that Deputy Attorney General Hynes might fully exercise his responsibilities in connection with the investigation of the nursing home industry;

NOW, THEREFORE, pursuant to subdivision 8 of section 63 of the Executive Law, and in accordance with the statute and law in such case made and provided, I find it to be in the public interest to require that you inquire into matters concerning the public peace, public safety and public justice with respect to possible criminal violations committed in connection with or in any way related to the management, control, operation or funding of any nursing home, care center, health facility or related entity located in the State of New York, or any principal, agent, supplier or other person involved therewith, and I so direct you to do so in person or by your assistant or deputies and to have the powers and duties specified in such subdivision 8 for the purpose of this requirement." [Emphasis added]

In April 1975, the Deputy Special Prosecutor advised counsel for Kent Nursing Home that its principals were targets of the investigation being conduct-

ed.

The non-judicial subpoena involved in this appeal was accepted (by prearrangement and with authority) by counsel for Kent Nursing Home for the purpose of testing the validity of the authority of the Special Prosecutor to issue same, to conduct the inquisitions sought and to apply to quash the same on the grounds that the constitutional rights of the principals of the nursing home would be violated by submission thereto.

The non-judicial subpoena required the production of multitudinous books and records, ranging over a period of eight years, comprising 27 different categories, and, in addition, the requirement on the part of the person receiving such non-judicial subpoena, to give evidence relative to the operation of the Kent Nursing Home.

The non-judicial subpoena was neither returnable before a Court, nor a Grand Jury; rather it was specifically returnable before the Special Prosecutor

at his office.

The instant proceeding was instituted in the Supreme Court of the State of New York, Westchester County, after a prior demand was made as required by New York Civil Practice Law & Rule §2304, for the withdrawal of the non-judicial subpoena on the ground that it called for (1) the production of books and records and compelled the giving of evidence by a principal of the Kent Nursing Home, who was a designated target of the investigation, with the production of such records and the submission to give testimony, subjecting such principal to possible incrimination, thereby violating his or her rights under the Fifth Amendment of the United States Constitution, and, further, that (2) such non-judicial subpoena was illegal, unauthorized and beyond the scope of any constitutional or statutory authority, with the demand for production of records being so extensive and unlimited, covering a period of 1968 to date, and would

disrupt the orderly procedure of the nursing home, as to be so oppressive as to constitute harrassment.

The request to withdraw or to modify or temper such subpoena was refused, giving rise to the instant proceeding which was made returnable at Special Term, Part I, Supreme Court, Westchester County.

The motion to quash was granted on May 22, 1975 by the Supreme Court of the State of New York; the order thereon was appealed to the Appellate Division of said Supreme Court, Second Judicial Department, by the Special Prosecutor, resulting in a reversal thereof by said Court by decision of June 18, 1975; the order thereon was appealed to the New York Court of Appeals, which affirmed by decision dated December 22, 1975.

REASONS FOR GRANTING THE WRIT

1. The records of a two-family partnership are constitutionally

protected under the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner herein is a two-family partnership, made up of a mother and son. The New York Court of Appeals held that the members of such a partnership do not have any privilege against self incrimination as to disclosure of the books and records of the partnership. It is clear, and long established that the Fifth Amendment privilege against self incrimination protects one from the compelled production of his personal papers, as well as from oral testimony. Boyd v. United States, 116 U.S. 616, 29 L. Ed. 746. This privilege applies to the business records of a sole proprietorship or practitioner. Boyd v. United States, supra; Couch v. United States, 409 U.S. 322, 34 L. Ed. 2d 548.

The New York Court of Appeals decision effectively removes the cloak of Fifth Amendment privilege from all small business ventures. The

decision is not consistent with the opinion of this Court in Bellis v. United States, 417 U.S. 84, 40 L. Ed. 2d 678. In Bellis, supra, it was held that the privilege did not extend to the records of a law partnership made up of unrelated individuals. However, this Court intimated that the answer might be different in a situation akin to the case at bar, stating:

> "This might be a different case if it involved a small family partnership, see United States v. Slutsky, 352 F Supp 1105 (SDNY 1972); In re Subpoena Duces Tecum, 81 F Supp 418, 421 (ND Cal 1948), or, as the Solicitor General suggests, Brief for the United States, at 22-23, if there were some other pre-existing relationship of confidentiality among the partners."

In the instant case, we have a partnership comprised of mother and son. It is hard to conceive of a relationship, business or otherwise, that is more sacred, more confidential and more akin to a single individual. The Court below failed

to recognize this, as set forth in Bellis. United States v. Slutsky, 352 F. Supp. 1105, held that the records of a partnership, made up of two brothers, were entitled to protection under the Fifth Amendment:

> "The partnership, consisting solely of two brothers, operates a resort known as the Nevele Country Club. The resort was originally opened in 1901 by the father of the partners. It consists of a hotel with 325 guest rooms with many facilities on a 1,000 acre tract of land in Ellenville, New York. The Nevele has a payroll of about $1,000,000, gross receipts of $4,000,000, buildings worth about $4,400,000, and a convention sales office in New York City. It employs several full-time and part-time cashiers, a full-time and part-time bookkeeper, and a full-time accountant. The partners live on the resort premises and personally manage it full time along with their two sons. These four are the only persons authorized to draw checks on the partnership. ***
>
> While partnership ownership is shared, it is nonetheless,

personal and, consequently, the business records of a partnership are really the personal records of each of the partners. Traditionally, therefore, partnership records have been constitutionally privileged under the Fifth and Fourth Amendments from compulsory production in a criminal prosecution. Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886); United States v. Brasley, 268 F. 59 (D.C.W.D.Pa. 1920); In re Subpoena Duces Tecum, 81 F. Supp. 418 (D.N.D. Cal. 1948." [Emphasis added]

See also: United States v. Cogan, 257 F.Supp. 170 (S.D.N.Y. 1966) and 98 C.J.S. §451, page 295.

The relationship of the parties in the Kent Nursing Home partnership is even more confidential than the one existing in Slutsky. Indeed, the business venture involved here, is, as in Slutsky, "rather than an impersonal and detached business owned by absentees with all the aspects of a corporation, the Nevele Hotel appears to be a personal family business, albeit large and successful." P. 1108. See also Moskowitz v. Hynes,

48 A.D. 2d 804 (11).

Such reasoning is equally applicable to the petitioner herein. To hold that the records of the mother-son partnership are not entitled to constitutional protection against compulsory disclosure in a non-judicial procedure where no immunity is granted, would be "to veer toward a proposition that no one has yet suggested - that even a sole tycoon, by virtue of his large business holdings, could be stripped of the privilege with respect to his business records". United States v. Cogan, supra, at 174.

The "different case" as alluded to in Bellis, supra, and set forth in Slutsky, supra, is now presented to this Court for decision. The Slutsky holding should be followed and confirmed in all respects.

The New York Court of Appeals appears to have based its decision in part upon the theory that no constitu-

tional protection extends to any records required to be kept pursuant to statutory authority. It is submitted that the Court below erroneously applied the "required records" doctrine to the related partners of the Kent Nursing Home. While it is true that in certain instances partnerships, or even individuals, lose their privilege against self incrimination as to records required to be kept, United States v. Shapiro, 335 U.S. 1, recent cases have eroded the holding of Shapiro. Grosso v. United States, 390 U.S. 62, 19 L. Ed. 2d 906 and Marchetti v. United States, 390 U.S. 29, 19 L. Ed. 2d 889, held that the required record exception could not be applied to records required to be kept pursuant to federal wagering and occupational tax statutes.

It is submitted that the records involved in this case do not have any "public aspects". As stated in Marchetti, supra, at 57:

> "The government's anxiety to obtain information known to a private individual does not without more, render that information public; nor does it stamp information with a public character that the government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by Act of Congress."

Cf. Shapiro v. United States, supra, dissenting opinion, Frankfurter, J.

The case at bar, and Slutsky, supra, are identical. Here, as there, there were requirements for the keeping of certain records. In Slutsky, there flowed from the operation of a large resort, the requirements, by law, to keep records of their guests, their income, their expenditures, their employees, to make reports and permit audits of their records to the federal and state tax agencies and alcoholic beverage agencies, and comply and permit inspections of their premises by health, fire and sanitation officials. Cf. Tax Law §1135, Alcoholic Beverage Control Law §106 (12).

Clearly, the Court of Appeals failed to apply Slutsky, supra, in the manner that this Court has suggested.

Furthermore, the records under subpoena have been shown to and audited by the New York State Department of Health, which is the only agency authorized to inspect these records. Nowhere to be found is there any authority for the inspection of these records by a "Special Prosecutor" in his office, without the Fifth Amendment protection against self incrimination, or immunity inuring to the individuals. Indeed, even if it was decided that the privilege was waived as to those records audited by the Health Department, the waiver does not extend to allow an inspection by the office of the Special Prosecutor. Moskowitz v. Hynes, supra; United States v. Miranti, 253 F. 2d 135.

A careful examination of the statutes cited to support the

proposition that these records constitute "required records", to which no privilege attaches, will show that the same are inapplicable. The same do not authorize nor allow the Special Prosecutor to inspect these records, nor are they kept for his convenience. It should be noted that the subpoena in question calls for the production of records and documents in some 27 areas, for a period of time running from the inception of the business to December 31, 1974, representing a period of approximately eight years.

Sec. 2803 of the Public Health Law as enacted in 1968, did not require the multitudinous records presently required by Sec. 2803-b of the Public Health Law. Indeed, it only allowed the Commissioner of Public Health to inspect the "system of accounts, records, and the adequacy of financial resources and sources of future revenues." Sec. 2803-b was not effective until June 13, 1974. That section established and required uniform reports and accounting

systems for hospital costs and applied to the petitioner herein.

Accordingly, the latter section, providing for detailed record keeping, cannot be cited as authority for the proposition that records kept by the partnership prior to June 13, 1974 are required records, and thus exempt from any claim of privilege.

2. The non-judicial subpoena was so extensive and overly broad so as to constitute a violation of petitioners' rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

At stated supra, at page 6 , the subpoena in question called for the production of records in some 27 different areas, for a period in excess of eight years. It is well settled that there are "limitations upon the power of public officials to issue subpoenas". Myerson v. Lentini Moving & Storage, 33 N.Y. 2d 250; Carlisle v. Bennett, 268 N.Y. 212.

Such power can be used only when "the books, and papers .... have some relevancy and materiality to the matter under investigation" and cannot be used to allow one to "embark upon a roving course to pry into the affairs of any person." Myerson v. Lentini, supra.

The agency asserting its subpoena power must show its authority, the relevancy of the items sought, and some basis for inquisitorial action. Furthermore, no agency of government may conduct an unlimited and general inquisition into the affairs of persons within its jurisdiction solely under prospect of possible violations of law being discovered. Matter of A'Hearn v. Committee on Unlawful Practice of Law, 23 N.Y. 2d 916.

In the case at bar, petitioners were advised at the outset that they were targets of a criminal investigation. The sole procedure of the subpoena issued herein was to force petitioners to produce massive records without any rights of immunity, for the sole purpose of dis-

covering possible criminal violations. Such procedure is to be condemned under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution.

In Jones v. Securities & Exchange Commission, 298 U.S. 1, 80 L. Ed. 1015, a subpoena was served calling for production of numerous books and records. The court there, holding the subpoena invalid, stated:

> "A general, roving, offensive, inquisitorial, compulsory investigation conducted ... without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence ... is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of citizens, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end."

To comply with the subpoena would mean that petitioners' business would be without needed records in its day to day operation. The same point was passed upon by this court in Hale v. Henkel, 201 U.S. 43, 50 L. Ed. 652. The

court, again holding the subpoena invalid, stated at page 76:

> "... We think the subpoena duces tecum is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence ... . Indeed, it is difficult to see how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case..".

An analysis of the subpoena in this case, as sustained by the court below, shows that the records sought encompass nearly every record that would normally be maintained in business. Accordingly, the subpoena, being overly broad, the issuance of which constitutes embarkation on a mere fishing expedition, is constitutionally invalid. Federal Trade Commission v. American Tobacco Company, 264 U.S. 298, 68 L. Ed. 696; Imparato v. Spicola, 238 So. 2d 503 [Fla. App. 1970].

The opposition to the motion to quash the non-judicial subpoena failed to demonstrate the need on the part of the Special Prosecutor to examine these extensive, voluminous and multitudinous papers.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully Submitted,

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APPENDIX

Opinion of the Court of Appeals
Of the State of New York

In the Matter of Kent Nursing Home, Appellant, v. Office of the Special State Prosecutor for Health and Social Services, Respondent.

Argued November 24, 1975; decided December 22, 1975.

COOKE, J. The three cases under review raise the fundamental question of whether the Deputy Attorney-General, for his part in the ongoing investigation of the nursing home industry, has subpoena power as provided in subdivision 8 of section 63 of the Executive Law.*

Deputy Attorney-General Hynes appeals from an order of the Appellate Division, First Department, which unanimously affirmed judgments of the Supreme Court, New York County, in Matter of Sigety v. Hynes and Matter of East Riv. Nursing Home v. Hynes. Each such judgment restrained Hynes from proceeding in excess of his lawful jurisdiction and quashed a subpoena duces tecum issued by him. Additionally, Kent Nursing Home appeals from an order of the Appellate Division, Second Department, which reversed an order of the Supreme Court, Westchester County, that had granted Kent Nursing Home's application to

quash a similar subpoena in Matter of Kent Nursing Home v. Office of Special State Prosecutor for Health & Social Servs. Because of the identity of central issue, these cases were argued and are now considered together.

On January 10, 1975, in response to growing concern as to the quality of care provided by private nursing homes receiving public financial assistance, the Governor, in Executive Order No. 2 (9 NYCRR 3.2) and pursuant to section 6 of the Executive Law, appointed a commissioner to head an official inquiry, looking into, among other things, the ownership, financing and control of nursing homes and residential facilities to the end of insuring "that nursing homes and homes which shelter the aged and disabled provide the highest quality of care with the greatest degree of economy." For, as the Governor stated in the preliminary paragraph of his Executive Order (9 NYCRR 3.2): "When public funds are channeled through private hands to finance health and residential services, government must insure that those funds are used honestly and efficiently in the promotion of the public welfare. The compassionate purpose of programs of residential and health care must not be subverted by the improper diversion of public funds for private benefit, nor through the inability of government to control the use of such

funds under present regulatory structures."

The commissioner, thereby appointed, was directed "to study, examine, investigate, review and make recommendations with respect to the management and affairs of any department, board, bureau, or commission of the State exercising any direction, supervision, visitation, inspection, funding or control of any nongovernmental nursing home, residential facility or home". To assist him in his investigation he was granted subpoena power and "[e]very State department, division, board, bureau, commission, council and agency" was instructed to "provide to the Commissioner every assistance, facility and cooperation".

In connection with the above-described investigation of the nursing home industry, and with acknowledgement of the January 10, 1975 appointment by the Attorney-General of Charles J. Hynes as Deputy Attorney-General to act as prosecutor to inquire into possible criminal violations in the nursing home industry, the Governor on February 7, 1975 issued Executive Order No. 4 (9 NYCRR 3.4). Finding it to be in the public interest to inquire into "matters concerning the public peace, public safety and public justice with respect to possible criminal violations committed in connection with or in any way related to the management, control, operation or funding" of any nursing home or health related facility, the Governor

directed that there be such inquiry and conferred upon the Attorney-General the appropriate powers and duties as specified in subdivision 8 of section 63 of the Executive Law. Prior to these directives, the Commissioners of Health and Social Services each had written to the Attorney-General requesting investigation pursuant to subdivision 3 of section 63 of the Executive Law of possible violation of the Public Health and Social Services Laws and it was subsequent to these requests that the Deputy Attorney-General had been appointed.

While a request made upon the Attorney-General in accordance with either subdivision 3 or 8 would serve to initiate investigation, the powers and duties of the Attorney-General are detailed and more particularly in the latter. Subdivision 8 begins as follows: "Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice." Said subdivision continues by providing, inter alia, that "[t]he attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath, before himself or a magistrate and require the production of any books or papers which he deems relevant or material to the inquiry" and by requiring that the Governor be pro-

vided with a detailed weekly report of the progress of the inquiry.

The subpoenas sought to be quashed were issued pursuant to subdivision 8 of section 63 of the Executive Law. The petitioner in each instance asserts that said subdivision does not serve as authority for issuance of such process. A similar challenge had been made to subpoenas issued pursuant to this statute in Matter of DiBrizzi (Proskauer) (303 NY 206). There, an investigation had been ordered by the Governor to be conducted by the Attorney-General and "officers of the Department of Law", denominated collectively as the New York State Crime Commission. Subpoenas, issued by the commission in connection with the executive directive (p 211) "'[t]o investigate generally the relationship between organized crime and any unit of Government anywhere in the state'", were unsuccessfully sought to be quashed. As this court stated in DiBrizzi (p 210) the words "inquire into matters concerning the public peace, public safety and public justice", employed in subdivision 8, are to be interpreted in their usual and ordinary sense and are not to be limited by a narrow and technical meaning. We there asserted that although it was a war emergency that brought about legislative recognition of the need for such a provision, the Legislature, in enacting said statute employed general terms and did not, either expressly or by implication, limit its operation to a time of war. "A general law may, and

frequently does, originate in some particular case or class of cases which is in the mind of the legislature at the time, but so long as it is expressed in general language, the courts cannot, in the absence of express restrictions, limit its application to those cases, but must apply it to all cases that come within its terms and its general purpose and policy" (People ex rel. McClelland v. Roberts, 148 NY 360, 368, cited as authority in Matter of DiBrizzi [Proskauer], supra, at p 214).

Widespread corruption in the nursing home industry, care of the elderly and infirm and compensation for that care from the public treasury are "matters concerning the public peace, public safety and public justice" just as organized crime and its relationship to units of government were held to be in DiBrizzi. To be distinguished, as it was in DiBrizzi, is a situation such as that found in Ward Baking Co. v. Western Union Tel. Co. (205 App Div 723) where the Governor directed the Attorney-General pursuant to the provisions of then section 62 of the Executive Law to inquire into the circumstances surrounding the death of Clarence E. Peters. The Appellate Division stating that the investigation therein was "directed and conducted with the sole purpose in view of obtaining proof that the individual Ward killed the individual Peters with malice aforethought" (p 727), concluded that subdivision 8 of then section 62 was not, nor could have been, intended to provide

for criminal investigation against a particular individual.

Here, as in DiBrizzi, the court recognizes that there exists a reasonable relation between the action taken by the Governor, through the Attorney-General, and the proper discharge of the executive function. Investigations pursuant to Executive Orders Nos. 2 and 4 serve to inform the Governor, who, so informed, can more adequately fulfill the obligations of his office.

In Sigety, Special Term here noted that the Attorney-General as an "Executive Official" has been authorized in other circumstances to utilize various investigative powers, including the subpoena power, in order to protect the public interest (e.g., Executive Law, §63 subd 12 [persistant fraudulent or illegal acts]; General Business Law, §343 [monopolies]; General Business Law, §352 [securities fraud]; Business Corporation Law, §109 [annul or dissolve corporation for cause]). Although the Attorney-General has often served the dual function of investigating and prosecuting, this court has never held, nor should it now hold, that his authority to issue subpoenas to investigate alleged violations of law is impaired by his obligation to prosecute such violations. Recently, in Matter of Greenthal & Co. v. Lefkowitz (32 NY2d 457, 463), an exercise of subpoena power under section 352 of the General Business Law was upheld, the

court noting that the article under which it is granted "is not only geared to prevent fraud, deception and wrongdoing" but is also "to assure investigation 'upon complaint or otherwise' and appropriate civil or criminal follow-up procedures when wrongdoing, in fact, is found." As clearly indicated in Dunham v. Ottinger (243 NY 423, 433), these statutes do not bestow judicial powers upon the Attorney-General. "He decides nothing in a judicial way. He passes upon no question of civil violation or of criminal guilt. The ultimate and only end to which he can proceed is by action or criminal prosecution to submit to the courts the question whether a person has been guilty of such unlawful practices that he should be enjoined from farther pursuing them or should be subjected to a criminal prosecution. Everything which he does leading up to this point is the performance of an executive or administrative power such as has long been recognized as perfectly appropriate and valid and whatever judicial decision follows is made by the courts. It is the performance of administrative duties by an executive official and in no sense the decision of justiciable questions exclusively delegated to the jurisdiction of judicial tribunals."

The subpoenas here issued pursuant to subdivision 8 of section 63 of the Executive Law, call attention to the provisions of section 73 of the Civil Rights Law reproduced on the reverse side of the process.

In People v. Mitchell (40 AD 2d 117, 121-122), the Appellate Division, Third Department, found that investigation of criminal conduct by the State Investigation Commission under said Civil Rights Law section met the constitutional requirements of due process and did not taint the defendant's subsequent indictment.

The issue of the Fifth Amendment privilege against self incrimination was raised by petitioner Kent Nursing Home and was properly disposed of by the Appellate Division. It is important to note that, while the Supreme Court in Bellis v. United States (417 US 85) held that a partner in a small law firm may not invoke his personal privilege so as to justify noncompliance with a subpoena requiring production of the partnership's financial records, that court did indicate that the result might be different if a small family partnership had been involved, citing to United States v. Slutsky (352 F Supp 1105). In Slutsky, the test of United States v. White (322 US 694,701) was applied to determine whether the records of a two-brother partnership which operated a large resort, known as the Nevele Country Club, were to receive the protection of the Fifth Amendment. Simply, the test is "whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or

represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." Under the factual circumstances, the Slutsky court determined that "[i]f the Nevele were owned by a sole proprietor, there can be no question that the records would be immune from production under the Fifth Amendment. The reason for such protection does not change because there is a shared proprietorship" (p 1107).

A nursing home is not by its nature a family business which the owners can run in any manner they choose. It falls within the definition of a "hospital" under section 2801 of the Public Health Law and, as such, is subject to extensive State regulation pursuant to article 28 of said law and title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Additionally, a nursing home receiving Medicaid funds must keep and make available to the appropriate State agency records regarding patient care and payments,pursuant to title 42 of the United States Code (§1396a, subd [a], par [27]). It is for these and similar reasons that a nursing home, albeit family-run, cannot rely on Slutsky.

In Matter of Sigety v. Hynes and Matter of East Riv. Nursing Home v. Hynes the order appealed from should be reversed and the petitions dismissed, with costs. In Matter of Kent Nursing

Home v. Office of Special State Prosecutor for Health & Social Servs. the order appealed from should be affirmed, with costs.

Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler and Fuchsberg concur.

In Matter of Sigety v. Hynes and Matter of East Riv. Nursing Home v. Hynes: Order reversed, etc.

In Matter of Kent Nursing Home v. Office of Special State Prosecutor for Health & Social Servs.: Order affirmed.

*Formerly section 62 of the Executive Law. (See L 1951, ch 800.)

Decision of the Supreme Court
Appellate Division

In the Matter of Kent Nursing Home, Respondent, v Office of the Special State Prosecutor for Health and Social Services, Appellant.

In a proceeding to quash a certain subpoena dated April 28, 1975, which directs petitioner, by Anna Severino, to appear for examination before Charles J. Hynes, Deputy Attorney-General of the State of New York, and to produce at that examination the books and records referred to therein, the appeal is from an order of the Supreme Court, Westchester County, entered May 27, 1975, which granted the application. Order reversed, on the law, with $20. costs and disburse-

ments, and application denied; proceeding remanded to Special Term to fix the time and place of the examination to be held pursuant to the subpoena. The books and records described in the subpoena are required to be kept by petitioner, Kent Nursing Home, in compliance with section 2803-b of the Public Health Law and 10 NYCRR 730.6. Therefore, petitioner cannot avoid production thereof on the theory that their contents tend to incriminate Anna Severino and her partner in their operation of the nursing home. By virtue of the above statutory provisions and regulations, petitioner, as a licensed nursing home, must keep books and records available for public inspection by duly authorized public officials (cf. Shapiro v. United States, 335 US 1, 5; also see, Matter of Lewis v. Hynes, 82 Misc 2d 256) Moreover, Severino, as one of the partners operating petitioner, cannot avoid the production of the books and records on the theory that the production thereof would personally incriminate her, since those books and records belong to the collective entity Kent Nursing Home (cf. Bellis v. United States, 417 US 85, 88; see, also, Matter of Lewis v. Hynes, supra). The appointment of appellant Hynes, as Deputy Attorney-General to conduct a criminal investigation as to unlawful practices in the operation of nursing homes in New York State, was permissible and appropriate under

section 63 of the Executive Law (cf. Matter of DiBrizzi, 303 NY 206, 214-215; see, also, Matter of Lewis v. Hynes, supra). That appointment furthers the public policy of this State to protect the elderly, infirm and disabled persons who have been entrusted to the care of nursing homes (Uzzillia v. Commissioner of Health of State of N.Y., 47 AD2d 492). Because of the large number of books and records required to be produced pursuant to the subpoena, we have directed that Special Term shall expeditiously fix the time and place for the examination and we note that in Matter of Lewis v. Hynes (supra), Special Term provided for the examination of the extensive materials involved therein at the place of business of the petitioner nursing home because of the expense and burden of transporting the material to the office of Deputy Attorney-General Hynes. Rabin, Acting P.J., Hopkins, Martuscello, Latham and Cohalan, JJ., concur.

Decision of the Supreme Court
Special Term

The following papers numbered 1 to 8 read on this motion by Petitioner to quash subpoena duces tecum dated April 28, 1975 and to restrain Respondent from any further proceedings against said Petitioner

Upon the foregoing papers it is ordered that this motion is in all respects granted.

A subpoena duces tecum issued out of the office of Charles J. Hynes, Attorney General commanding the Petitioner Kent Nursing Home to appear at the office of said Special Prosecutor as a witness "in an inquiry into the management, control, operation and funding of nursing homes" etc. "being conducted by the Deputy Attorney General pursuant to Section 63(8) of the Executive Law of the State of New York and the Executive Order of Governor Hugh Carey, dated February 7, 1975," and to produce at said time and place books and records of the said Kent Nusing Home, "listed on the attached Schedule A for the period from the date of commencement of the Kent Nursing Home through December 31, 1974". The attached Schedule A contains 27 specific items constituting the books and records sought to be examined.

The petitioner seeks to quash the said subpoena as being too extensive and overbroad and has raised objection that by submitting such books and records and requiring the personal appearance of the copartners operating said Nursing Home, they could suffer infringement of their constitutional rights against self incrimination. The subpoena indeed indicates that certain criminal penalties may be involved.

The Petitioner further contends that the said examination is not for investigative purposes in order to fashion new legislation in the conduct and operation of nursing homes but rather is a "fishing

expedition" by the Special Prosecutor in order to obtain evidence as the basis for possible prosecution.

The Petitioner further attacks the authority and power of the Special Prosecutor under the Executive Order to conduct the criminal investigation against targets who might be the subject of indictments, inasmuch as no right is given to grant either testimonial or actual immunity. Failing in this regard, it is contended that the said investigation as being conducted is illegal and unconstitutional.

In the well-reasoned decision of Justice Fine in Matter of Sigety (Hines) reported in the New York Law Journal, May 20th, 1975, page 2 (column 4) each of the objections herein made were reviewed at length based upon existing law and cases cited in support thereof.

This Court has no hesitancy whatever in following and adopting the sound reasoning in the opinion of Justice Fine herein before referred to.

Dated: White Plains, N.Y.
May 22, 1975

Hon. James R. Caruso
Acting Justice of
the Supreme Court

United States Constitution

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Public Health Law

Sec. 2803
Effective until April 1, 1973

Commissioner and council; powers and duties. -- 1. The commissioner shall have the power to inquire into the operation of hospitals and to conduct periodic inspections of facilities with respect to the fitness and adequacy of the premises, equipment, personnel, rules and by-laws, standards of medical care, hospital service, including health-related service, system of accounts, records, and the adequacy of financial resources and sources of future revenues.

2. The council, by a majority vote of its members, shall adopt and amend rules and regulations, subject to the approval of the commissioner, to effectuate the provisions and purposes of this article, including, but not limited to (a) the establishment of requirements for a uniform statewide system of reports and audits relating to the quality of medical and physical care provided, hospital utilization and costs, (b) establishment by the department of schedules of rates, payments, reimbursements, grants and other charges for hospital and health-related services as provided in section two thousand eight hundred and seven, (c) standards and procedures relating to hospital operating certificates, and (d) the establishment of a system of accounts and cost finding to be used

by hospitals, including a classification of such hospitals and the prescription of a system of accounts and cost finding for each class. The commissioner may propose rules and regulations and amendments thereto for consideration by the council.

3. The commissioner may enter into contracts with any political subdivision, voluntary non-profit agency or regional hospital council and such entities are authorized to enter into contracts with the commissioner to effectuate the purposes of this article.

4. At the request of the commissioner, hospitals shall furnish to the department such reports and information as it may require to effectuate the provision of this article.

5. The commissioner may institute or cause to be instituted in a court of competent jurisdiction proceedings to compel compliance with the provisions of this article or the determination, rules, regulations and orders of the commissioner or the council.

Sec. 2803-b
Effective June 13, 1974

Uniform Reports and accounting systems for hospital costs.-- 1. The council, after public hearings with respect to its proposed systems of uniform hospital accounting and reporting, shall, by majority vote of its members and subject to approval of the

commissioner, adopt and amend approved systems of uniform hospital accounting and reporting which are designed to enable hospitals to fairly, accurately and efficiently prepare the financial reports required by subdivision three of this section. Existing systems of accounting and reporting used by hospitals shall be examined and taken into consideration by the council in carrying out its function pursuant to this section. The council shall take such steps as are necessary to adopt the approved system of uniform hospital accounting and reporting by January first, nineteen hundred seventy-five.

2. The council, where appropriate to reflect differences in hospital size and services or in the method of providing or paying for hospital and related services, may allow for modifications in the accounting systems approved pursuant to subdivision one of this section.

3. Every organization which operates, conducts or maintains a hospital, and the officers thereof, shall furnish to the department with respect to each licensed hospital operated, conducted or maintained by the organization, within one hundred twenty days after the close of each fiscal year commencing after the adoption of systems of uniform hospital accounting and reporting approved under subdivision one of this section, all of

the following reports on forms specified by the council:

(a) A balance sheet detailing the assets, liabilities and net worth of the hospital at the end of its fiscal year;

(b) A statement of income, expenses, and operating surplus or deficit for the annual period ending on the balance sheet date;

(c) A statement detailing the source of application of all funds expended by the hospital for the period encompassed by the income statement required by paragraph (b) of this subdivision;

(d) A report of hospital expenditures which allocates the costs of nonrevenue-producing departments of a hospital to the other nonrevenue and revenue-producing centeres which they serve. This report shall be accompanied by a sufficiently detailed statistical report containing data describing the hospital's basic services and patient statistics which identifies costs related to categories of hospital services delivered to patients by each department of the hospital, in accordance with a list of such services required by the council pursuant to subdivision one of this section.

4. The commissioner shall adopt forms of authentication for use by hospital officers or licensed accountants preparing reports under this section stating that each such officer or accountant making the authentication believes that to the extent of his knowledge and

information each statement in the report is true.

5. The council shall report annually to the legislature and the executive department no later than the fifteenth day of January, developments under this section and methods currently in use to implement the provisions of section twenty-eight hundred seven of this article.

75-1345

IN THE

Supreme Court of the United States

October Term, 1976

In the Matter of the Application of

KENT NURSING HOME,

Petitioner,

for an Order to Quash a Subpoena issued by the Office of the Special State Prosecutor for Health and Social Services (Charles J. Hynes),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In the Matter of the Application of

KENT NURSING HOME,

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for an Order to Quash a Subpoena issued by the Office of the Special State Prosecutor for Health and Social Services (Charles J. Hynes),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Proceedings Below

In an unanimous decision, entered December 22, 1975, the New York State Court of Appeals held that a subpoena duces tecum issued to the petitioner nursing home by the Deputy Attorney General was lawful, and that the two-person partnership which owns the nursing home has no Fifth Amendment privilege with respect to its books and records. *Matter of Kent Nursing Home* v. *Special State Prosecutor for Health and Social Services,* 38 N.Y. 2d 260 (1975), *aff'g,* 49 A.D.2d 616 (1st Dept. 1975).

On January 19, 1976 the petitioner was granted a temporary stay of the subpoena by Judge COOKE of the Court of Appeals so that he could apply to a Justice of this Court for a stay pending consideration of a certiorari petition. The petitioner made such an application to Justice MARSHALL which was denied. Thereafter, the Deputy Attorney General began examining the subpoenaed books and records at the Kent Nursing Home.

Jurisdictional Statement

The petitioner seeks a writ of certiorari to review the order and decision of the Court of Appeals pursuant to 28 U.S.C. §1257(3).

Questions Presented for Review

1. Whether a two-person, family partnership which owns a nursing home receiving state and federal funds under the Medicaid Program can refuse to comply with a subpoena seeking the books and records of that home on the ground that they are within their private enclave and therefore protected by the Fifth Amendment?

2. Whether the non-judicial subpoena issued by the Deputy Attorney General for the books and records of a nursing home pursuant to his authority to investigate nursing homes violates the Fourth Amendment?

Statement of the Case

By law, the Attorney General of the State of New York and his deputies may, when requested by the Governor, inquire into matters affecting the public peace, public safety and public justice. McKinney's Consolidated Laws of New York, Executive Law, §63(8). By an executive order, the Governor requested the Attorney General to inquire into the nursing home industry in New York State. Pursuant to the authority of Section 63(8), the Deputy Attorney General issued a subpoena duces tecum to the Kent Nursing Home on April 28, 1975, directing it to produce certain books and records. Annette Severino, who owns the Kent Nursing Home in partnership with her son, moved to quash this subpoena on the grounds that Section 63(8) of the Executive Law had been improperly invoked by the Governor and that compliance with the subpoena would violate her privilege against self-incrimination. The Supreme Court of Westchester County granted her motion on the ground that Section 63(8) had been improperly invoked. The Deputy Attorney General appealed that decision to the Appellate Division, Second Department, which unanimously reversed it, holding that Section 63(8) had been properly invoked and that the owners of the nursing home have no Fifth Amendment privilege with respect to the nursing home records subpoenaed by the respondent. The opinion of that Court states in relevant part:

> The books and records described in the subpoena are required to be kept by petitioner, Kent Nursing Home, in compliance with section 2803-b of the Public Health Law and 10 NYCRR 730.6. Therefore, petitioner cannot avoid production thereof on the theory that their

> contents tend to incriminate Anna Severino and her partner in their operation of the nursing home. By virtue of the above statutory provisions and regulations, petitioner, as a licensed nursing home, must keep those books and records available for public inspection by duly authorized public officials (cf. *Shapiro* v. *United States,* 335 U.S. 1, 5; also see, *Matter of Lewis* v. *Hynes,* 82 Misc 2d 256). Moreover, Severino, as one of the partners operating petitioner, cannot avoid the production of the books and records on the theory that the production thereof would personally incriminate her, since those books and records belong to the collective entity Kent Nursing Home (cf. *Bellis* v. *United States,* 417 U.S. 85, 88; see, also, *Matter of Lewis* v. *Hynes, supra*).

Matter of Kent Nursing Home v. *Office of Special State Prosecutor for Health and Social Services,* 49 A.D.2d 616, 616-17 (1st Dept. 1975).

The petitioner appealed that order to the Court of Appeals which unanimously affirmed the decision of the Appellate Division, stating:

> The issue of the Fifth Amendment privilege against self-incrimination was raised by petitioner Kent Nursing Home and was properly disposed of by the Appellate Division. It is important to note that, while the Supreme Court in *Bellis* v. *United States* (417 U.S. 85) held that a partner in a small law firm may not invoke his personal privilege so as to justify noncompliance with a subpoena requiring production of the partnership's financial records, that court did indicate that the result might be different if a small family partnership had been involved, citing to *United States* v. *Slutsky* (352 F. Supp. 1105). In *Slutsky,* the test of *United States* v. *White* (322 U.S. 694, 701) was applied to determine whether the records

> of a two-brother partnership which operated a large resort, known as the Nevele Country Club, were to receive the protection of the Fifth Amendment. Simply, the test is "whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." Under the factual circumstances, the *Slutsky* court determined that "[i]f the Nevele were owned by a sole proprietor, there can be no question that the records would be immune from production under the Fifth Amendment. The reason for such protection does not change because there is a shared proprietorship" (p. 1107).
>
> A nursing home is not by its nature a family business which the owners can run in any manner they choose. It falls within the definition of a "hospital" under section 2801 of the Public Health Law and, as such, is subject to extensive State regulation pursuant to article 28 of said law and title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Additionally, a nursing home receiving Medicaid funds must keep and make available to the appropriate State agency records regarding patient care and payments, pursuant to title 42 of the United States Code (§1396a, subd. [a] par. [27]). It is for these and similar reasons that a nursing home, albeit family-run, cannot rely on *Slutsky.*

Matter of Kent Nursing Home v. *Special State Prosecutor for Health and Social Services,* 38 N.Y.2d 260, 268 (1975).

POINT I

The petition should be denied as moot.

Following the decision of the Court of Appeals, the petitioner sought a stay from Justice MARSHALL of this Court pending determination of this petition. That application was denied and the Deputy Attorney General then examined the books and records commanded by the subpoena. Therefore, the claim made by the owners of the Kent Nursing Home regarding the Fifth Amendment are moot. *Cf. DeFunis* v. *Odegaard,* 416 U.S. 312 (1974).

POINT II

The petition should be denied for want of a substantial federal question.

The decision of the Court of Appeals was in conformity with the law of this Court as announced in *Bellis* v. *United States,* 417 U.S. 85 (1974). There was nothing personal or private about the books and records held by the partnership in this case notwithstanding the fact that the partners are mother and son. As the Court of Appeals held, these records serve as the basis for determining the Medicaid reimbursal rate for nursing homes and are required by law to be kept for examination by the Department of Health.*

* The petitioner asserts in his brief that prior to the enactment of a statute in 1974 [McKinney's Consolidated Laws of New York, Public Health Law §2308-b] there was no requirement that the records sought by the Deputy Attorney General's subpoena be kept by nursing homes. (Petitioner's Brief, at 17-18.) He argues that this statute cannot be applied to the books and records sought by the subpoena, which date from the establishment of the nursing home in 1966. This claim is specious.

(footnote continued on next page)

Cf. Shapiro v. *United States,* 335 U.S. 1, 5 (1948). Moreover, nursing homes which receive state and federal funds under the Medicaid Program to care for elderly and infirm patients are not, by their very nature, private businesses. Rather, they are public hospitals [McKinney's Consolidated Laws of New York, Public Health Law §2801] which are funded by public monies to effectuate a public policy of providing adequate health care free of cost to the elderly poor.

The petitioner's claims regarding the reasonableness of the subpoena under the Fourth Amendment are frivolous. The books and records of the Kent Nursing Home are beyond cavil relevant to the inquiry into the nursing home industry being conducted by the Deputy Attorney General. The Fourth Amendment does not require more. *See Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 210 (1946).

As the Appellate Division held, each of the records sought by the respondent was required to be kept by a regulation of the Department of Health which was first promulgated in 1966. 10 NYCRR 730.6 [formerly 752.61]; *cf.* 42 U.S.C. §1396a(a) (27). As the petitioner knows, neither the New York courts nor the respondent ever relied upon Section 2803-b of the Public Health Law to support the conclusion that these records are required records. Indeed, in his brief to the Court of Appeals, the petitioner did not dispute the applicability of 10 NYCRR 730.6 to all the books and records subpoenaed but argued that it authorized the Department of Health only to examine those records and not the Deputy Attorney General.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES J. HYNES
Deputy Attorney General
State of New York

T. JAMES BRYAN
Special Assistant Attorney General
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IN THE

Supreme Court of the United States

October Term, 1975, No. 75-1345

KENT NURSING HOME,

Petitioner,

-against-

Special State Prosecutor for Health and Social Services (CHARLES J. HYNES),

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
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POINT I

THIS PROCEEDING IS NOT MOOT. THE EXAMINATION OF THE BOOKS AND RECORDS OF PETITIONER IS AN ONGOING ONE.

The petition for certiorari should not be denied as moot. In fact, petitioner was ordered and directed by the New York Supreme Court to allow the examination of its books and records. The examination was not submitted to voluntarily, but, rather, was in compliance with and under compulsion of court order. The same constitutes testimonial compulsion. Cf. Bumper v. North Carolina, 391 U.S. 543.

The investigation and auditing of petitioner's voluminous books and records cannot be completed in a few days. Indeed, the investigation, by its very nature, is a continuing and ongoing one. The examination and auditing of the books and records of Kent Nursing Home is not complete, is still continuing, and is expected to continue for some time in the future, all at the petitioner's place of business, by representatives of respondent. Under these circumstances, petitioners are entitled to all of the protections afforded them by the Constitution.

POINT II

THE RECORDS SUBPOENAED ARE NOT "REQUIRED RECORDS".

Respondent states in his brief at pages 6 and 7 thereof, that Public Health Law §2803B was not relied upon by the courts of New York to support the conclusion that the subpoenaed records are required records. Such a statement flies in the face of the explicit language of the Appellate Division, which relied upon that section specifically for its determination that the records subpoenaed were "required records". 49 A.D. 2d 616, (Appendix pg. 34), which was affirmed by the New York Court of Appeals on the same basis. As stated in the Petition for Certiorari, Public Health Law §2803B was not in force until 1974, accordingly, any claim that that section is authority for the keeping of various records prior to 1974 is specious. The constitutional rights of the petitioner cannot and should not have been torn away by reason of an inapplicable statute.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully Submitted,

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